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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 162

WILEY BRANTON,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

THURMAN L. DODSON,
Counsel for petitioner.

W. HAROLD FLOWERS,
RUTH C. FLOWERS,
EDWARD V. TRIMBLE,
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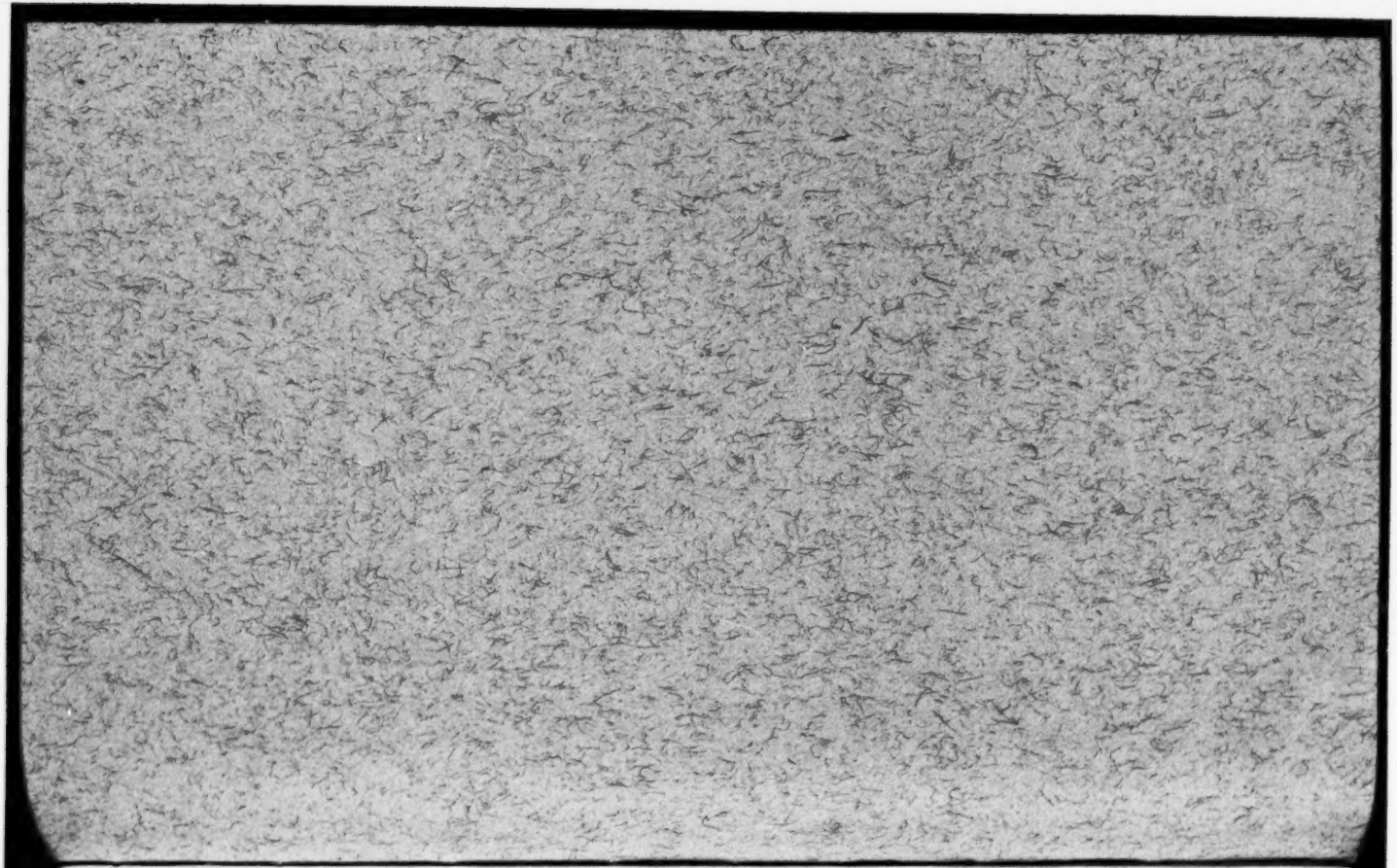

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Summary statement of facts involved	2
Questions presented	3
Reasons relied upon for the allowance of the writ	3
Conclusion	5
Brief in support of petition	7
Opinion of the court below	7
Jurisdiction	7
Statement of the case	7
Statement of facts	8
Argument	8

Table of Cases Cited

Abrams v. *United States*, 250 U. S. 624	11
DeJonge v. *State of Oregon*, 57 S. Ct. 255, 299 U. S. 353, 81 L. Ed. 278	10
Gitlow v. *People of the State of New York*, 45 S. Ct. 625, 268 U. S. 652, 69 L. Ed. 1138	12
Hague v. *C.I.O.*, 307 U. S. 496, 83 L. Ed. 1423	12
Johnson v. *Clark*, 25 Fed. Supp. 285	9
Lovell v. *City of Griffin*, 58 S. Ct. 566, 303 U. S. 444, 82 L. Ed. 949	10
Schneider v. *Irvington*, 308 U. S. 147, 84 L. Ed. 155	12
Thomas v. *Collins*, 65 S. Ct. 315, 323 U. S. 516 89 L. Ed. 430	10
West Virginia Board of Education v. *Barnette*, 319 U. S. 624	11

Statutes Cited

Constitution of Arkansas, Article II, Section 6	3
Constitution of the United States:	
First Amendment	10
Fourteenth Amendment	4, 10

Page

Judicial Code, section 237 as amended (28 U. S. Code, 344b) 1, 7

Pope's Digest of the Statutes of Arkansas:

Section 4725 9
Section 4757 9
Section 4873 ..... 3, 8

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review a judgment and order of the Supreme Court of the State of Arkansas affirming verdict and judgment of Jefferson Circuit Court of said State.

A

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. Code, 344b).

The judgment sought to be reviewed was entered by the Supreme Court of the State of Arkansas, the Court of last resort in said State, on March 7, 1949 (R. 37), and Petitioner's Petition for a Rehearing was denied on April 4, 1949 (R. 43). The judgment of the Supreme Court of Arkansas is not reported officially. It appears in the Record at pp. 37-42.

B

Summary Statement of Facts Involved

1. *Salient Facts:*

The petitioner, Wiley Branton, was tried upon information filed by the Prosecuting Attorney for Jefferson County (R. 1) in the Municipal Court of Pine Bluff, Arkansas, upon the charge of committing a misdemeanor, and was convicted and fined in the sum of Three Hundred ($300.00) Dollars and Costs. At the trial de novo on appeal to the Jefferson Circuit Court, petitioner was convicted of "distributing ballots outside of those ballots ordered for use in the election for the purpose of instructing voters how to vote" (R. 35) and fined in the sum of Three Hundred ($300.00) Dollars. The Petitioner offered no testimony on the facts and did not take the stand in his own behalf.

2. *Theory of the Trial:*

Since the Petitioner presented no testimony on the merits of the case and did not take the stand in his own behalf there can be no dispute as to the facts.

But Petitioner did move to quash the information filed against him (R. 2) on the ground that an information denied him the due process of law guaranteed him under the 14th amendment to the Constitution of the United States, and

also that Section 4873 of Pope's Digest which, in part, reads as follows:

> "It shall be unlawful to print or distribute any ballots outside of those ballots ordered for use in the election for the purpose of instructing voters how to vote" (R. 28)

was in violation of the Federal Bill of Rights and the privileges and immunities of American citizenship; thereby raising substantial questions of federal law.

The motion was promptly denied (R. 3) and this denial was affirmed by the Supreme Court of Arkansas.

C

Questions Presented

I

Whether the State of Arkansas may, under its Constitution, Article II, Section 6, and Section 4873 of Pope's Digest of the Statutes of Arkansas, prevent an elector from making a list of candidates and arranging them in printed form showing the various offices sought, and thereby not deny him of the Constitutional guaranties provided in the Fourteenth Amendment to the Constitution of the United States.

II

Whether the distribution of a mimeographed paper list of candidates for public office held by the lower Court to be a ballot within the meaning of Section 4873 of Pope's Digest of Arkansas Statutes, under which Petitioner was convicted, is a denial to him of the guaranties of American citizenship.

D

Reasons Relied upon for the Allowance of the Writ

1. The prohibition embodied in Section 4873 of Pope's Digest of Arkansas Statutes against the distribution of

ballots other than those ordered for use in the election for the purpose of instructing voters how to vote is in violation of the Constitution and laws of the United States.

(a) "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Constitution of the United States.

(b) The provision of the First Amendment to the Constitution of the United States to the effect that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of their grievances" is applicable to the State within the meaning of the Fourteenth Amendment (supra).

2. The enactment of the State of Arkansas, upon which the Petitioner was convicted, is an unreasonable restraint in the exercise of police power in regulating elections in that it violates the Constitutional guaranties of freedom of speech,.

In support of the foregoing grounds of application, the Petitioner submits herewith the accompanying Brief setting forth in detail the pertinent arguments applicable to such petition.

Petitioner, through his counsel in this Court, expressly states that this application is filed in good faith and not for purposes of delay.

Conclusion

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Arkansas be granted.

THURMAN L. DODSON,
Attorney for Petitioner.

W. HAROLD FLOWERS,
RUTH C. FLOWERS,
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SUPREME COURT OF THE UNITED STATES

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

Opinion of the Court Below

The opinion of the Supreme Court of the State of Arkansas is not officially reported. It appears in the Record at pages 37-42.

Jurisdiction

The Jurisdiction of the Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. Code, 344b).

Statement of the Case

The statement of the case and the nature of the application for the Writ are set forth in the accompanying Petition for Certiorari.

Statement of Facts

At the trial in the Jefferson Circuit Court the only facts on which this application for a Writ of Certiorari is based, were brought out in the motions to Quash the Information (R. 2), for Directed Verdict (R. 27) and for a new Trial (R. 35). Briefly the basic facts in the case are as follows:

Petitioner appealed from his conviction in the Municipal Court of Pine Bluff, Arkansas, (R. 1) and the trial de novo in the Jefferson Circuit Court was an affirmance of his conviction (R. 5) in the Municipal Court. The Judge of the Jefferson Circuit Court directed a verdict of guilty and submitted the case to the jury to determine the punishment (R. 28). The Court directed the verdict as there was no dispute as to testimony but disagreed with Petitioner's contention that Exhibit A (R. 29) was not a ballot within the meaning of the statute. The mimeographed paper writing (R. 29) was held to come within the intendment of the statute. The official ballot used in the Democratic primary of August 10, 1948, was printed (R. 31-34) while the paper writing which Petitioner was convicted of distributing was mimeographed with no designation as to what it was. Petitioner distributed the mimeographed paper writing on or about August 3, 1948, a week prior to the election.

The Arkansas Supreme Court affirmed the conviction from which this application for a Writ of Certiorari issued.

Argument

The Petitioner, Wiley Branton, was convicted and fined Three Hundred Dollars ($300.00) of having violated the provisions of Section 4873 of Pope's Digest, which is as follows:

> "A misdemeanor to intimidate elector, etc. It shall be unlawful for any person to make any threat or attempt to intimidate any elector or his family, his business or profession, and it shall also be unlawful to attempt to prevent any qualified elector from voting at

any primary election. It shall be unlawful to print or distribute any ballots outside of those ballots ordered for use in the election, for the purpose of instructing voters how to vote. It shall be unlawful for any person to attend any voting place on election day and hand out, or give away, any campaign cards, placards, or other articles for the purpose of influencing the electors to vote for any candidate. Any violation of any of the provisions of this section of this act shall be deemed a misdemeanor and punished by a fine not exceeding $500.00."

It is not contended here that the police power of the State may not be extended to insure free and equal elections but it is obvious that the statute above relating to elections was enacted for the purpose of preventing the intimidation of electors, and the influencing of support through the distribution of ballots which might be used in casting illegal votes at the polls.

This Court may take judicial notice of the fact that it is a common practice in political newspaper advertising that the name of all candidates and the parties they represent frequently appear in newsprint with large circulation.

Definition of Ballot

The lower court held that the paper writing distributed by Petitioner was a ballot within the meaning of the above statute. However, the statute states that "*It shall be unlawful to print . . . any ballots . . .*" (Italics supplied). Exhibit A (Tr. 29), which Petitioner was convicted of distributing did not have the word "ballot" written thereon and the mimeographed paper writing was not even an exact copy of the official ballot (Tr. 43) in that the names were not listed in order; no caption is there as is provided by Arkansas Election Laws. See Pope's Digest, Sections 4725 and 4757. The case of *Johnson* v. *Clark*, 25 Fed. Supp. 285, holds that "The word 'ballot,' in an election provision means a method which will insure, so far as is possible, the secrecy

and integrity of the popular vote. *State* v. *Keating*, 53 Mont. 371, 163 P. 1156." It certainly cannot be contended that a mimeographed paper writing with no designation as a ballot and with the names not in the order in which they appear on the official ballot comes within the definition of the word "ballot."

Freedom of Speech

The Petitioner urges this Court to invalidate that portion of Section 4873, Pope's Digest, as applied to him, on the grounds that it is in violation of the provisions of the Federal Constitution, the First and Fourteenth Amendments thereof.

The guaranty of freedom of speech and of the press are protected by the First Amendment from infringement by Congress and are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. *Lovell* v. *City of Griffin, Ga.*, 58 S. Ct. 566, 303 U. S. 444, 82 L. Ed. 949; *DeJonge* v. *State of Oregon*, 57 S. Ct. 255, 299 U. S. 353, 81 L. Ed. 278.

Although the statute here involved apparently was assumed to be a valid exercise of the State's police powers, the question is where the individual's freedom ends and the State's police power begins. The choice is always delicate and especially so when the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great indispensable democratic freedoms secured by the First Amendment.

Thomas v. *Collins*, 65 S. Ct. 315, 323 U. S. 516, 89 L. Ed. 430:

> "Any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds,

will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. . . . It was not by accident or coincidence that these rights in freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable."

Cf. West Virginia Board of Education v. *Barnette,* 319 U. S. 624, 631;

Mr. Justice Holmes dissenting in *Abrams* v. *U. S.,* 250 U. S. 624, 639;

DeJonge v. *State of Oregon,* 299 U. S. 353, 364.

Petitioner contends that the statute, as applied to him must be reasonably calculated to accomplish its end and must be necessary for that purpose. *DeJonge* v. *State of Oregon, supra.* It cannot be said that the prohibition against the distribution of paper writings with the names of candidates is reasonably calculated to prevent fraud at the polls, especially where there is a striking dissimilarity between the official ballot and the paper writing which Petitioner distributed. The paper writing here involved amounted to no more than a handbill similar to those distributed in *Lovell* v. *City of Griffin, Ga., supra,* and the other handbill cases decided by this Court. The Arkansas Election Law requires that ballots be printed but Petitioner was convicted of distributing mimeographed paper writings which could not be and were not confused with the official ballot.

Further, Petitioner points out that he was doing a desirable thing in educating the public in voting. Rather than working against the public welfare (which is the test of

whether or not action may be curbed), Petitioners' actions were in the public interest and welfare. Although Petitioner instructed his audience how to vote, he admonished them to vote their choices. Certainly, the police power of a State is not paramount to such an exercise of freedom of speech. This Court held in *Schneider* v. *Irvington,* 308 U. S. 147, 84 L. Ed. 155, "Although a municipality may enact regulations in the interest of public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Cf. Hague* v. *C. I. O.,* 307 U. S. 496, 83 L. Ed. 1423.

There is no reasonable relationship between the State's admitted right to secure for its subjects free elections and a prohibition on Petitioner's actions in educating prospective voters with mimeographed paper writings. In fact, Petitioner's action was more reasonably calculated to bring about free elections. Nor can it be said that Petitioner's conduct brought about a clear and present danger of fraudulent elections to come within the purview of *Gitlow* v. *People of the State of New York,* 45 S. Ct. 625, 268 U. S. 652, 69 L. Ed. 1138.

Conclusion

We respectfully submit that the statute here involved, as applied to Petitioner, is an abridgement of his constitutional rights under the First and Fourteenth Amendments and is an invalid exercise of the State's police power.

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Attorney for Petitioner.

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